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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36369

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR DECLARATORY ORDER

Digest:[1] In response to a request for a declaratory order regarding preemption of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program and discharge prohibition, the Board declines to issue a declaratory order but provides guidance and explains that the NPDES permitting program and discharge prohibition would likely be preempted by 49 U.S.C. § 10501(b) if applied to discharges incidental to the operation of rail cars in transit.

Decided: December 29, 2020

On November 27, 2019, the Association of American Railroads (AAR) filed a petition for a declaratory order asking the Board to find that the preemption provision of the Interstate Commerce Act, 49 U.S.C. § 10501(b), as amended by the ICC Termination Act of 1995 (ICCTA), preempts two provisions of the Clean Water Act (CWA)—the National Pollutant Discharge Elimination System (NPDES) permitting program, 33 U.S.C. § 1342 and the discharge prohibition, 33 U.S.C. § 1311—as applied to discharges incidental to the operation of rail cars in transit. (AAR Pet. 1.) For the reasons explained below, the Board concludes that issuing such an order would be premature, and, accordingly, declines to issue a declaratory order at this time. See U.S. Envtl. Protection Agency—Pet. for Declaratory Order (EPA Declaratory Order), FD 35803, slip op. at 6 (STB served Dec. 30, 2014) (declining to issue a declaratory order regarding preemption because it was premature). However, the Board will provide guidance on the issue and explain that, based on the structure of the CWA and the manner in which it is currently administered, the NPDES permitting program and discharge prohibition would likely be preempted by § 10501(b) if applied to discharges incidental to the operation of rail cars in transit.[2]

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] For purposes of providing guidance regarding the preemption issues raised by AAR's petition, the Board assumes, without deciding, that coal particles or particles of other commodities coming from a rail car in transit constitutes the "discharge of a pollutant" and that a rail car in transit meets the definition of "point source" under the CWA.

BACKGROUND

On February 19, 2020, the Board instituted a proceeding to consider AAR's petition. Ass'n of Am. R.Rs.—Pet. for Declaratory Order, FD 36369 (STB served Feb. 19, 2020). The Board has received numerous comments[3] and letters[4] on the issues raised in the petition.[5]

ICCTA Preemption. Section 10501(b) provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." "Transportation" is defined broadly to encompass "a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services related to that movement." 49 U.S.C. § 10102(9). In addition, § 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The Board and courts have stated that the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states. See, e.g., Elam v. Kan. City S. Ry., 635 F.3d 796, 804 (5th Cir. 2011) (a purpose of ICCTA was to create a "[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation") (quoting H.R. Rep. No. 104–311, at 93 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 805); Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1338-39 (11th Cir. 2001) (stating that a desire to prevent a "patchwork of regulation . . . motivated the passage of the ICCTA" and that "[i]n reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole

[3] Comments on the petition were submitted by: AAR; the American Coal Council (Coal Council); the American Farm Bureau Federation (Farm Bureau); the American Short Line and Regional Railroad Association (ASLRRA); BNSF Railway Company (BNSF); the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes of Warm Springs); the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation); EPA; the Freight Rail Customer Alliance (FRCA); the National Mining Association (NMA); the National Coal Transportation Association (NCTA); the National Grain and Feed Association (NGFA); the North American Freight Car Association (NAFCA); and the Railway Supply Institute (RSI). The Board also received a joint comment by the American Soybean Association, the National Association of Wheat Growers, and the National Corn Growers Association (collectively, Crop Associations), as well as joint comments by Sierra Club, Natural Resources Defense Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Spokane Riverkeeper, RESources for Sustainable Communities, and Puget Soundkeeper (collectively, Environmental Organizations).

[4] Letters were filed by: U.S. Representative Rick Crawford; U.S. Senators Kevin Cramer, Steve Daines, and John Hoeven and U.S. Representatives Kelly Armstrong and Greg Gianforte; U.S. Senators Michael B. Enzi and John Barrasso and U.S. Representative Liz Cheney; U.S. Representative Dusty Johnson; U.S. Representatives Sam Graves and Rick Crawford; U.S. Senators John Barrasso, Kevin Cramer, Shelley Moore Capito, James M. Inhofe, M. Michael Rounds, Dan Sullivan, John Boozman, and Joni K. Ernst; and U.S. Senators Roger F. Wicker, Deb Fischer, John Thune, Roy Blunt, Ted Cruz, Jerry Moran, Dan Sullivan, Marsha Blackburn, Shelley Moore Capito, Ron Johnson, and Todd Young.

[5] In the interest of a complete record, all late filings will be accepted into the record.

across the nation."); Pet. of Norfolk S. Ry. for Expedited Declaratory Order, FD 35949, slip op. at 3 (STB served Feb. 25, 2016) ("The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce.").[6]

Section 10501(b) preempts all *state* laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote effect on rail transportation. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (quoting Fla. E. Coast Ry., 266 F.3d at 1331). State or local laws affecting rail transportation can be categorically preempted or preempted "as applied." EPA Declaratory Order, FD 35803, slip op. at 7. Two broad categories of state and local actions have been found to be categorically preempted "regardless of the context or rationale for the action": (1) state or local permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized; and (2) state or local regulation of matters that are directly regulated by the Board. CSX Transp., Inc.—Pet. for Declaratory Order (CSX Transp. May 2005), FD 34662, slip op. at 3 (STB served May 3, 2005); Pet. of Norfolk S. Ry., FD 35949, slip op. at 3. State or local laws that are not categorically preempted still may be preempted "as applied" if they would have "the effect of unreasonably burdening or interfering with rail transportation." EPA Declaratory Order, FD 35803, slip op. at 8.

In contrast, when another *federal* law (such as the CWA) potentially conflicts with the purposes of § 10501(b), the Board or a court "must strive to harmonize the two laws, giving effect to both laws if possible." Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097-98 (9th Cir. 2010). See also Joint Pet. for Declaratory Order—Bos. & Me. Corp., 5 S.T.B. 500, 509 n.28 (explaining that two federal statutes should be harmonized unless there is a "positive repugnancy" or "irreconcilable conflict" between them), recons. denied 5 S.T.B. 1041 (2001).

The CWA. The CWA prohibits the discharge of any amount of a "pollutant"[7] from a "point source" (defined to include "rolling stock," 33 U.S.C. § 1362(14)) into navigable waters without a permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). Remedies for unpermitted discharges include injunctive relief as well as administrative, civil, and criminal penalties. 33 U.S.C. § 1319. Permits for discharges of pollutants are issued under the NPDES permitting program pursuant to 33 U.S.C. § 1342. Under § 1342 and EPA's regulations, EPA may authorize qualified states to administer all or part of the NPDES program. 33 U.S.C. § 1342(b); 40 C.F.R. part 123. Permits issued by authorized states must meet EPA permitting requirements but may contain more stringent terms and conditions. See 33 U.S.C. § 1370; see also id.

[6] See also DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914, slip op. at 1 (STB served May 7, 2010) ("[F]ederal regulation of rail transportation in interstate commerce is intended to avoid a patchwork of conflicting and parochial regulatory actions that impede the flow of people and goods throughout the nation.")

[7] "Pollutant" is broadly defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

§ 1311(b)(1)(C); 40 C.F.R. § 123.25(a). Individual permits can be issued to authorize discharges from a single facility, see 40 CFR § 122.21, or general permits can be issued to authorize discharges from a category of facilities, see 40 C.F.R. § 122.28. Once a state is authorized to issue its own NPDES permits, EPA's authority to issue such permits in that state ceases. 33 U.S.C. § 1342(c)(1). According to AAR, 47 states have been authorized by EPA to administer the NPDES permitting program.[8] (AAR Pet. 5.)

Under the CWA, states must prescribe water quality standards applicable to their surface waters. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.4. Water quality standards consist of designated uses for a body of water (e.g., fishing, swimming, public water supply), 40 C.F.R. § 131.10, and criteria to protect those designated uses, id. § 131.11. Water quality criteria may be numeric (e.g., specifying the maximum levels of pollutant permitted in a body of water) or narrative (e.g. describing the conditions of the body of water as free from toxic pollutants in toxic amounts). Id. § 131.11. NPDES permits may contain two types of effluent limitations to ensure compliance with water quality standards: technology-based effluent limitations (TBELs) and water quality-based effluent limitations (WQBELs). See 40 C.F.R. § 122.44(a), (d). TBELs and WQBELs can be stated as numeric standards or as required best management practices. See id. § 122.44(k).

TBELs are required for all discharges and are based on the best practicable control technology currently available for reducing discharges. See 33 U.S.C. § 1311(b). EPA may set nationally applicable effluent limitations guidelines that prescribe the basis for setting TBELs for certain categories and classes of point sources. Id. § 1314(b). "Once EPA establishes effluent limitations guidelines, [an individual] permit writer is responsible for translating the limitations and other requirements of the effluent limitations into TBELs and other conditions appropriate for inclusion in an NPDES permit." EPA, NPDES Permit Writers' Manual at 5-22 (Sept. 2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. However, states can also establish technology-based requirements more stringent than any EPA nationally applicable guidelines. See 33 U.S.C. §§ 1342(a)(1), 1370; 40 C.F.R. § 123.25(a). EPA has not set guidelines for discharges from rail cars. (AAR Pet. 6.) In the absence of national guidelines, TBELs are set on a case-by-case basis by employing a permit writer's "best professional judgment." 40 C.F.R. § 125.3(a)(2)(i)(B), (c)(2). If TBELs are not sufficient to ensure compliance with water quality standards for a particular body of water, the applicable NPDES permit must prescribe more stringent WQBELs that ensure compliance with water quality standards. 33 U.S.C. § 1311(b)(1)(C), (d); 40 C.F.R. § 122.44(d)(1). As a result, WQBELs may vary not just from state to state but from one body of water to another within a state.

NPDES permits must also include monitoring conditions. 40 C.F.R. § 122.48. Monitoring requirements are set on a case-by-case basis and involve consideration of a multitude

[8] Massachusetts, New Hampshire, New Mexico, and the District of Columbia are not authorized to administer the NPDES program and therefore EPA continues to administer the NPDES program in those jurisdictions. See EPA, NPDES Program Authorizations (July 2019), https://www.epa.gov/sites/production/files/2020-04/documents/npdes_authorized_states_2020_map.pdf.

of factors that vary according to the permittee, the pollutant(s) involved, and the body of water at issue. See generally, EPA, NPDES Permit Writers' Manual, Chapter 8 (Sept. 2010).

Even where EPA administers the NPDES permitting program, a state may nonetheless add additional requirements to an EPA-issued permit through the permit certification process as necessary to ensure that a permit applicant will comply with any effluent limitations or other limitations under the CWA and any other appropriate requirement of State law. 33 U.S.C. § 1341(d).

Neither EPA nor any state has ever applied the NPDES permitting program to rail cars in transit. (Envtl. Orgs. Comments 8; AAR Pet. 2.) In Sierra Club v. BNSF Railway, No. 2:13-cv-00967, slip op. at 17-18 (W.D. Wash. Oct. 25, 2016), however, the court held that the rail cars in transit in that case, which were allegedly emitting coal particles directly over and next to navigable waters, were a "point source" subject to the CWA's discharge prohibition and that BNSF could be liable for those discharges if the plaintiffs could establish that the discharges actually occurred. Although BNSF raised the issue of preemption of CWA remedies by ICCTA, the case settled before the court addressed whether ICCTA preempted the plaintiff's requested relief.

The Parties' Arguments. AAR argues that, even though the case was settled, the court's decision in Sierra Club has created uncertainty regarding the application of the CWA to incidental discharges from rail cars in transit and that the Board should resolve that uncertainty through a declaratory order. (AAR Pet. 2.)

AAR argues that unless a rail car owner or operator can ensure that no particle of any commodity, no matter how small, will leave a rail car in transit and enter a body of water, that owner or operator will face liability under the CWA—including potential administrative, civil or criminal penalties and injunctive relief directed at rail operations—unless it can obtain a permit under the NPDES program. (Id. at 1, 12, 15.) However, AAR claims that application of the NPDES permitting program to rail cars in transit is not permissible under the prevailing legal standard. (Id.) AAR argues that, under the harmonization standard of the Board and the courts, any direct regulation of core rail operations under another federal law, including an environmental law, is preempted. (Id. at 15-16.) AAR claims that application of the CWA to rail cars in transit would constitute such direct regulation because NPDES permitting requirements could prevent a railroad from providing service, and complying with its statutory common carrier obligation, by withholding permits or imposing onerous permit requirements and because permit requirements would directly impact how rail carriers move various commodities. (Id. at 17.)

AAR further argues that application of the CWA to discharges from rail cars in transit, which frequently travel through numerous states and by numerous bodies of water, is preempted because it will inevitably create a patchwork of different state regulations, which is impermissible under the harmonization standard. (AAR Pet. 15-16, 19-20.) According to AAR, this is because the CWA delegates enormous discretion to states in setting permit conditions and because permits are often granted with respect to a particular body of water and include specific technology-based restrictions as well as effluent limits based on the water quality standards

applicable to that body of water. (Id. at 18.) AAR also argues that EPA likely could not issue a nationwide permit applicable to incidental discharges from rail cars in transit because it did not exempt rail cars from its delegation of authority to the 47 states that are authorized to administer the NPDES program within their borders. (Id. at 18-19.) In addition, AAR suggests that a patchwork of regulation is still likely to result from any nationwide permit because, in the only instance in which EPA attempted to issue a nationwide permit, which was for marine vessels, the states nonetheless added numerous differing permit conditions beyond those required by EPA. (Id. at 7, 9.) In support of its position, AAR also cites to EPA Declaratory Order, FD 35803, where the Board found that regulations issued by an air quality management district in California under the Clean Air Act, which would be given the force and effect of federal law if approved by EPA, would likely be preempted. (Id. at 14-15.)

AAR also claims that NPDES permitting would directly interfere with the Board's exclusive authority over the economic relationship between railroads and their customers. (Id. at 21-23.) According to AAR, in Arkansas Electric Cooperative Corp.—Petition for Declaratory Order, FD 35305 (STB served Mar. 3, 2011), and Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. at 19 (STB served Dec. 13, 2013) (collectively, the Coal Dust decisions), the Board addressed the requirements railroads could impose on shippers to reduce or prevent the loss of coal dust during transit. (AAR Pet. 21-22.) AAR argues that allowing states to impose NPDES requirements to limit the loss of coal in transit would usurp the Board's exclusive authority to govern the economic relationship between railroads and shippers and almost certainly conflict with the standards set by the Board in the Coal Dust decisions, based on the rail transportation policy at 49 U.S.C. § 10101, which Congress intended to be the basis for railroad regulation. (Id. at 22-23; see also BNSF Comments 17-18.)

AAR also asserts that there are compelling policy reasons for the Board to find that application of the CWA to incidental discharges from rail cars in transit is preempted. AAR projects that application of the CWA to such discharges would create enormous disruptions to the interstate rail network, including potentially causing the rerouting of trains to avoid waterways, changes to equipment and operating practices, and discontinuation of transportation of certain commodities, in particular geographic areas, or altogether. (AAR Pet. 24.) AAR claims that it is also not clear which party or parties would be responsible for ensuring compliance with NPDES permit requirements and that defining these relative responsibilities could require substantial changes in commercial relationships. (Id. at 24-25.) Finally, AAR asserts that it is not clear whether permits would be issued for individual rail cars, train sets or broader sets of rail activities, such as transportation of coal from a particular point of origin. AAR argues that permitting of individual rail cars or particular train sets would be extremely challenging given the dynamic nature of rail operations and given that rail cars typically are transported to a wide variety of locations under the control of different entities and frequently move in and out of a single train set. (Id. at 25-26.)

Coal Council, ASLRRA, BNSF, Crop Associations, Farm Bureau, NAFCA, NCTA, NGFA, NMA, and RSI support AAR's petition, arguing that application of the NPDES permitting program to incidental discharges from rail cars in transit would likely result in differing regulations across states that would be highly disruptive and burdensome to their

respective industries and to rail transportation generally. FRCA does not take a position on AAR's petition but states that application of the CWA to rail cars in transit could increase the difficulty and expense of transporting coal and other goods by rail. EPA filed comments providing a summary of certain aspects of the NPDES program but takes no position on the merits of AAR's petition.

The Environmental Organizations argue that, under Board precedent, a preemption analysis requires the Board to examine the specific requirements imposed on the railroads and determine whether those requirements unreasonably burden interstate commerce. (Envtl. Orgs. Comments 7-8.) The Environmental Organizations claim that AAR's petition is premature because, absent any current attempts to impose any permit conditions on rail cars in transit, AAR's claims that application of the CWA will create a patchwork of regulations are speculative. (Id.) The Environmental Organizations assert that the Board lacks the "concrete instances of regulation of discharges from rail cars in transit" that are necessary for the Board to determine whether the regulations would unreasonably interfere with rail transportation. (Id. at 7-10.) According to the Environmental Organizations, even if the Board finds that state administration of the NPDES permitting program is preempted because it would result in a patchwork of regulation, the relief requested in AAR's petition would still be inappropriate because EPA could issue a nationally uniform general permit for discharges from rail cars in transit. (Id. at 13 n.28.) In addition, the Environmental Organizations assert that a federal statute cannot be held to have repealed an earlier enacted federal statute by implication absent "clear and manifest" Congressional intent to preempt the earlier law and a finding that the two statutes are completely irreconcilable. (Id. at 15-16; Envtl. Orgs. Reply 5-7.) The Environmental Organizations argue that § 10501(b) does not demonstrate a clear intent to repeal the NPDES permitting program under the CWA, which specifically defined "point source" to include "rolling stock."[9] (Envtl. Orgs. Comments 19; Envtl. Orgs. Reply 6-7; see also Tribes of Warm Springs Comments 3; Yakama Nation Comments 5-6.) The Environmental Organizations also argue that the text and legislative history of 49 U.S.C. § 10501(b) indicate that it is primarily concerned with preemption of economic, rather than environmental, regulation. (Envtl. Orgs. Comments 20.) According to the Environmental Organizations, the Board's regulations contemplate that railroads are required to comply with NPDES permitting requirements. (Id. at 21 (citing 49 C.F.R. § 1105.7).) Moreover, the Environmental Organizations assert that the Board and courts have consistently found that § 10501(b) does not preempt federal environmental laws, including the CWA. (Id. at 15-17.) The Environmental Organizations also claim that regulation of rail operations under the CWA is similar to public health and safety measures imposed by the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration, which no party argues should be preempted by ICCTA. (Id. at 10-11.)

The Tribes of Warm Springs and the Yakama Nation additionally argue that the CWA protects their treaty-reserved rights to harvest fish and that the Board should decline to issue an order finding that the CWA's NPDES permitting program and discharge prohibition are

[9] The Environmental Organizations suggest that AAR's petition effectively asks the Board to write the term "rolling stock" out of the CWA's definition of "point source." (Envtl. Orgs. Comments 3.)

preempted to ensure that their treaty-reserved rights are not violated. (Tribes of Warm Springs Comments 2-3; Yakama Nation Comments 3-4.)

AAR and BNSF dispute the Environmental Organizations' argument that AAR's petition is premature. AAR argues that there is no need to wait for the development of more facts because no party disputes their fundamental premise: that the delegation of NPDES permitting authority to the states guarantees a patchwork of regulation, which therefore, in their view, would per se unreasonably burden interstate commerce if applied to incidental discharges from railcars in transit. (AAR Reply 7-9.) Moreover, AAR notes that the Environmental Organizations' suggestion that the patchwork problem could be avoided if EPA were to issue a nationally uniform permit ignores the reality that states could still add their own state-specific requirements to any national permit. (Id. at 8; see also BNSF Reply 11-12.)[10] AAR also asserts that issuance of a declaratory order at this point is appropriate because of the uncertainty created by the district court's decision in Sierra Club finding, without addressing § 10501(b) preemption, that the rail cars in transit that were at issue in that case were "point sources" subject to the CWA's NPDES permitting program and discharge prohibition. (AAR Reply 10-12; see also BNSF Reply 6, 10 (arguing that Sierra Club shows that CWA compliance would significantly burden rail transportation).)

AAR and BNSF further argue that the Environmental Organizations' claim that the Board and courts have consistently found that ICCTA does not preempt the CWA misinterprets precedent. (AAR Reply 17-19; BNSF Reply 14-16.) According to BNSF, the language cited by the Environmental Organizations is dicta because EPA Declaratory Order is the only Board case that actually involved the application of federal environmental law. (BNSF Reply 14.) In addition, BNSF argues that the Board precedent cited by the Environmental Organizations merely recognizes, as the Board did in EPA Declaratory Order, that federal environmental law is generally not preempted by ICCTA because it does not generally regulate rail operations directly. (Id.) BNSF claims that court cases cited by the Environmental Organizations are also consistent with the conclusion that state enforcement of federal environmental law is preempted where it seeks to directly regulate rail operations (Id. at 15; see also AAR Pet. 17-19 (distinguishing cases cited by the Environmental Organizations).) In addition, BNSF asserts that courts have repeatedly rejected the Environmental Organizations' argument that ICCTA only preempts economic regulation, and that, in any event, application of the NPDES permitting program to rail cars in transit would amount to economic regulation because it would be enormously disruptive to the economic relationships within the rail industry. (BNSF Reply 15-16.)

With respect to the Tribes of Warm Springs' and the Yakama Nation's claims that a finding of preemption in this case would interfere with treaty-reserved rights, AAR argues that treaty rights arise from the treaties themselves, and not the CWA, and therefore a finding of preemption does not preclude the tribes from seeking other remedies available to them to enforce their rights under the treaty. (AAR Reply 19; see also BNSF Reply 13.)

[10] In addition, BNSF claims that even if the states could be excluded from administering the CWA, regulation of rail transportation by EPA under the CWA would be preempted because it would conflict with the Board's exclusive jurisdiction. (BNSF Reply 12.)

AAR argues that even under the implied repeal framework, the Board should find that ICCTA repeals the application of the CWA to incidental discharges from rail cars in transit. According to AAR, ICCTA grants authority with respect to interstate rail transportation specifically while the CWA is a statute of more general applicability—and a more specific statute enacted later in time should prevail over an earlier, more general statute. (AAR Reply 20-21.) AAR and BNSF further argue that the fact that the Board's environmental reporting regulations at 49 C.F.R. § 1105.7 require applicants, in railroad licensing cases involving specific rail lines, to submit information regarding the CWA during the Board's environmental review process for those projects is not relevant to the preemption analysis in this case, which is narrowly focused on NPDES permits for incidental discharges from rail cars in transit. (Id. at 21; BNSF Reply 18.) Finally, with respect to the term "rolling stock," BNSF argues that even if preemption is found here with respect to incidental discharges from rail cars in transit, the term "rolling stock" would not be read out of the statute because it would apply with respect to rail cars in other contexts and to other forms of rolling stock. (BNSF Reply 17-18.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board finds that a declaratory order here is premature.

The Board has authority to issue a decision in this case. The Tribes of Warm Springs, the Yakama Nation, and the Environmental Organizations argue that under Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), harmonization of different statutory regimes is a matter for the courts, not agencies, and that the Board therefore should refrain from engaging in a harmonization analysis with respect to § 10501(b) and the CWA. (Tribes of Warm Springs Comments 4; Yakama Nation Comments 4-5; Envtl. Orgs. Comments 5-7; Envtl. Orgs. Reply 3-5.) However, Epic Systems addresses the level of deference to be accorded to an agency harmonization analysis but does not prohibit agencies from providing guidance with respect to the statutes they administer, which is what the Board is doing in this case. In addition, the present case is distinguishable from Epic Systems because § 10501(b), unlike the statute at issue in Epic Systems, expressly preempts the application of other federal statutes. Section 10501(b) explicitly provides that "remedies . . . with respect to the regulation of rail transportation" under other federal laws are preempted. The statute requires, in certain circumstances, the preemption of other federal laws and does not prohibit the Board from opining on its interpretation of the other federal laws to determine where ICCTA preemption applies.[11]

[11] Epic Systems involved a determination by the National Labor Relations Board (NLRB) that a provision of a statute it administered, the National Labor Relations Act (NLRA), displaced a provision of a statute administered by another agency, the Federal Arbitration Act. Unlike § 10501(b), the NLRA provision at issue was silent on whether it preempted the

Issuance of a declaratory order here is premature. As explained above, the Board has authority to issue a declaratory order to eliminate controversy or remove uncertainty. Here, AAR asks the Board for a declaratory order to remove uncertainty. The Sierra Club decision holding that rail cars in transit are "point sources" subject to the CWA's NPDES permitting program and discharge prohibition, while declining to address ICCTA preemption, has created some uncertainty for railroads and other stakeholders. However, the Sierra Club litigation, which was initiated in 2013 and ended in settlement, appears to be the only attempt in the nearly 50-year history of the CWA to enforce either the discharge prohibition or the NPDES permitting program with respect to rail cars in transit. Moreover, no party to the current proceeding has suggested that future enforcement efforts are planned or likely to occur. Nor has any state proposed any regulation regarding discharges from rail cars in transit. Therefore, any future enforcement is speculative at present. Given the lack of any current dispute or any indication that a future dispute is imminent, the issuance of a declaratory order at this point would be premature. See EPA Declaratory Order, FD 35803, slip op. at 6 (declining to issue a declaratory order regarding preemption of proposed rules because it was premature); Commuter Rail Div. of the Reg'l Transp. Auth.—Pet. for Declaratory Order—Status of Chi. Union Station, FD 36171, slip op. at 1, 4 (STB served Aug. 22, 2018) (declining to issue a declaratory order regarding the applicability of statutory remedies because it was premature).[12]

Nonetheless, as explained further below, the Board will provide guidance explaining that if individual states (and the EPA in those jurisdictions in which it administers the NPDES program) were to apply the NPDES permitting program to discharges from the incidental operation of rail cars in transit, it would likely result in a patchwork of differing regulations that cannot be harmonized with § 10501(b) and therefore would likely be preempted. If there is any attempt in the future to establish NPDES permit requirements or enforce the discharge prohibition on discharges incidental to the operation of rail cars in transit, the preemption issue would then be ripe for review and any party may petition the Board for a declaratory order seeking a formal preemption determination.[13]

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application of other federal laws. The fact that the NLRA contained no language indicating that it was intended to displace other federal law or that Congress intended to delegate authority to the NLRB to interpret statutes administered by other agencies weighed heavily in the Supreme Court's determination that deference to the NLRB's determination was not due. Epic Systems, 138 S. Ct. at 1625, 1629.

[12] See also Chelsea Prop. Owners—Pet. for Declaratory Order—Highline, FD 34259, slip op. at 3 (STB served Nov. 27, 2002) ("There is no reason to institute a declaratory order proceeding to resolve issues that may never arise."); Am. Bus Assoc.—Pet. for Declaratory Order—Connecting Services, MC-C-30224, slip op. at 1-2 (ICC served Feb. 27, 1995) (declining to issue a declaratory order to resolve uncertainty regarding whether a motor carrier's statutory duties would conflict with certain self-help measures against connecting carriers where it was not clear that the carrier would engage in such measures).

[13] Because no state has proposed any regulation regarding discharges from rail cars in transit at this time, it cannot be determined whether there will ever exist varying regulations between the states that would create the kind of patchwork of conflicting state regulations that

Application of the NPDES permitting program in its current form would likely create a patchwork of differing permit requirements. Due to the structure of the NPDES permitting program as currently administered, which is based on state-specific permitting requirements, application of the permitting program to discharges incidental to the operation of rail cars in transit appears likely to result in a patchwork of differing regulations. As explained above, individual permit writers are responsible for translating EPA's TBEL guidelines into state-specific permit requirements and have discretion to impose TBELs more stringent than EPA guidelines and, in the absence of EPA guidelines, set TBELs on a case-by-case basis based on their "best professional judgment."

WQBELs and monitoring requirements are also likely to vary from state to state. Where TBELs are not sufficient to ensure compliance with a state's water quality standards, which are set with respect to individual bodies of water based on designated uses assigned by the state, the state must prescribe WQBELs that ensure compliance with water quality standards. States also set monitoring requirements on a case-by-case basis, taking into consideration a multitude of factors that vary according to the permittee, the pollutant(s) involved, and the body of water at issue. In short, variability of permit conditions is an essential feature built into the structure of the NPDES permitting system to allow states to tailor their regulations to their policy goals, the specific characteristics of their waters, and the discharges at issue. For these reasons, application of the NPDES permitting program, as currently administered, to discharges incidental to the operation of rail cars in transit would likely result in a patchwork of differing regulations.

The NPDES permitting program requirements, as currently administered, cannot likely be harmonized with § 10501(b) and therefore would likely be preempted. The preemption provision of the Interstate Commerce Act, as broadened by the ICCTA, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). To that end, § 10501(b) provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The purpose of § 10501(b) is to provide uniform regulation of rail transportation and to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states.[14]

That does not mean that § 10501(b) always has a preemptive effect. "[I]f two Federal statutes are 'capable of coexistence,' the statutes should be harmonized and each should be

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would interrupt the free flow of interstate commerce. However, if regulations did vary from state to state, it is difficult to imagine that such varying regulations would not impose such impermissible interruptions.

[14] See Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010); Fla. E. Coast Ry., 266 F.3d at 1339; Pet. of Norfolk S. Ry., FD 35949, slip op. at 3; EPA Declaratory Order, FD 35803, slip op. at 7; H. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808 ("[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.").

regarded as effective unless there is a 'positive repugnancy' or an 'irreconcilable conflict' between the laws." Joint Pet. for Declaratory Order—Bos. & Me. Corp., 5 S.T.B. at 509 n.28 (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996)). The courts and the Board have stated that this harmonization standard is applicable to apparent conflicts between § 10501(b) and other federal statutes, including environmental statutes. See, e.g., Ass'n of Am. R.Rs., 622 F.3d at 1097; CSX Transp., Inc. May 2005, FD 34662, slip op. at 6 ("[W]hile a literal reading of section 10501(b) would suggest that it preempts all other federal law, neither the Board nor the courts have interpreted the statute in that manner.").

The Environmental Organizations argue that any preemption determination by the Board requires an analysis of specific permit requirements to determine if they impose an unreasonable burden on rail transportation. (Envtl. Orgs. Comments 8-10.) But that is not correct. While issuance of a declaratory order here is premature, for the reasons discussed above, the Board finds that no such analysis would be required if a patchwork of differing regulations that interrupted the free flow of interstate commerce, as discussed above, were imposed on rail cars, which are essential for moving freight from state to state. Such a patchwork would, by its nature, be incompatible with § 10501(b)'s purpose of ensuring uniform regulation of rail transportation. See EPA Declaratory Order, FD 35803, slip op. at 8; see also Pet. of Norfolk S. Ry., FD 35949, slip op. at 5.

In EPA Declaratory Order, EPA sought a declaratory order determining whether state-specific locomotive idling regulations promulgated by California would be preempted if approved by EPA and thereby given the force of federal law pursuant to the Clean Air Act. EPA Declaratory Order, FD 35803, slip op. at 1. The Board declined to issue a declaratory order due to substantial questions as to whether EPA could lawfully approve the regulations. Id. at 5-6. However, the Board explained that the regulations would likely be preempted because allowing states to implement a patchwork of regulations "governing how an instrument of interstate commerce is operated, equipped, or kept track of" would conflict with the purpose of § 10501(b), which is to ensure uniform regulation of interstate rail transportation. (Id. at 10.) The application of the current NPDES permitting program to incidental discharges from the operation of rail cars in transit similarly would regulate an instrument of interstate commerce by governing how rail cars are equipped and/or operated. Such regulation under the current state-specific NPDES permitting program, as noted, is likely to vary from state to state. As a result, application of the current NPDES program to incidental discharges from rail cars in transit under those circumstances would likely be irreconcilable with § 10501(b)'s goal of providing uniform regulation of rail transportation and ensuring the free flow of interstate commerce,[15] and

[15] The Environmental Organizations suggest that Congress intended § 10501(b) to ensure uniform *economic* regulation of rail transportation and that there is therefore no conflict between § 10501(b) and environmental regulations. (Envtl. Orgs. Comments 20.) However, the Board and courts have rejected the notion that § 10501(b) applies only to economic regulation. See, e.g., N.Y. Susquehanna & W. Ry., 500 F.3d at 252; City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served March 14, 2005).

therefore would likely be preempted.[16]

It is unlikely that the Board would come to a different conclusion regarding the likelihood of preemption based on the Environmental Organizations' argument that, because there are two federal statutes at issue here, (1) the analysis should focus not on preemption but rather on repeal by implication, and (2) § 10501(b) does not demonstrate a "clear and manifest" Congressional intent to repeal the NPDES permitting program. (Envtl. Orgs. Comments 14-15; Envtl. Orgs. Reply 5-6.) As explained above, the Board would likely find that the NPDES permitting program as currently administered is incompatible with the purpose of § 10501(b). In that context, under the repeal by implication analysis, the later-enacted statute, § 10501(b), would be given effect. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) ("[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one . . . .") (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)); Henry v. Educ. Fin. Serv. (In re Henry), 944 F.3d 587, 591-92 (5th Cir. 2019). (stating that Congressional intent for the federal Bankruptcy Code to displace the requirements of the Federal Arbitration Act was demonstrated by the inherent conflict between the two statutory schemes).[17]

The Environmental Organizations further argue that the general preemptive language of § 10501(b) cannot preempt the CWA's specific prohibition on discharges from rolling stock without a permit because, absent clear Congressional intent to the contrary, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (Envtl. Orgs. Reply 5-6 (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987).) However, the fact that the CWA refers to rolling stock as an example of a point source does not appear to make the CWA's NPDES permitting program and discharge prohibition more specific than § 10501(b). The CWA's NPDES permitting program and discharge prohibition apply across all industries to any type of "discernible, confined and discrete conveyance," and provides "rolling stock" as merely one of many examples of such conveyances. 33 U.S.C. § 1362(14). In contrast, § 10501(b) is limited to the regulation of rail transportation. Thus,

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[16] If state-specific permitting under the NPDES program were to be preempted in the future and not replaced by a nationwide uniform general permit, rail carriers could arguably be accused of operating in violation of the CWA's discharge prohibition. If the CWA's discharge prohibition were to be applied in a manner that interferes with the free flow of interstate commerce, such as—in the clearest examples—by requiring carriers to cease service (even temporarily) or requiring the transportation of certain commodities to meet an impracticable or unreasonable standard, it would likely be preempted. See Green Mountain R.R.—Pet. for Declaratory Order, FD 34052, slip op. at 6 (STB served May 28, 2002).

[17] See also Tug Allie-B, Inc. v. United States, 273 F.3d 936, 948 (11th Cir. 2001) (finding that application of a statute that limits a vessel owner's liability for damages would "completely frustrate" the purpose of the later-enacted Park System Resources Protection Act and that the later-enacted statute therefore controls); EPA Declaratory Order, FD 35803, slip op. at 8, 10 (stating that state-specific regulations under the Clean Air Act likely could not be harmonized with § 10501(b) because allowing states to enact a variety of differing regulations would be contrary to the purpose of § 10501(b).)

§ 10501(b) is arguably the more specific statutory provision.[18] In addition, the rule governing specific versus general statutes does not apply in the face of clear Congressional intent to the contrary. Crawford Fitting Co., 482 U.S. at 445 ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . .") (quoting Radzanower, 426 U.S. at 153). As explained above, Congress clearly intended that § 10501(b) preempt laws that create an irreconcilable conflict with the free flow of interstate commerce by imposing a patchwork of regulation on interstate rail transportation. Although the Board is not issuing a declaratory order in this decision, such a patchwork appears likely if the current NPDES permitting program, structured to grant states broad discretion in setting state-specific permit conditions, is applied to incidental discharges from rail cars in transit.

The Board also would unlikely be persuaded by the Environmental Organizations' claim that court and Board precedent demonstrate that ICCTA cannot preempt federal environmental laws, including the application of the CWA. (Envtl. Orgs. Comments 15-18.) The Board has stated that "[f]ederal statutes, including environmental statutes and statutes regulating hazardous materials by rail, are also given effect *unless* they irreconcilably conflict and cannot be harmonized with the Interstate Commerce Act." San Pedro Peninsula Homeowner's United, Inc.—Pet. for Declaratory Order, FD 36065, slip op. at 4-5 (STB served Mar. 6, 2017) (emphasis added); see also EPA Declaratory Order, FD 35803, slip op. at 8, 10 (federal environmental law is preempted under § 10501(b) if it is likely to result in a patchwork of regulation of interstate rail transportation). Additionally, the court cases cited by the Environmental Organizations do not support their argument because those cases did not involve federal regulation of rail transportation that would vary from state to state in a manner that would conflict with § 10501(b)'s purpose of ensuring the free flow of interstate commerce.[19] (Envtl. Orgs. Comments 16-18.)

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[18] See Ozark Air Lines, Inc. v. Nat'l Mediation Bd., 797 F.2d 557, 563 (8th Cir. 1986) ("[T]he [Railway Labor Act] is tailored to the rail and air carrier industries, in contrast to the generality of the Norris-LaGuardia Act."); CSX Transp., Inc. v. Pub. Util. Comm'n of Ohio, 701 F. Supp 608, 614 (S.D. Ohio 1998) (holding that a provision of the Federal Rail Safety Act was more specific than a provision of the Hazardous Materials Transportation Act because the former applied only to rail transportation while the latter applied to all modes of transportation); see also PDS Consultants, Inc. v. United States, 907 F.3d 1345, 1358 (Fed. Cir. 2018) (holding a statute applicable to procurements of a single agency was more specific than a statute imposing contracting requirements on government agencies generally).

[19] See Swinomish Indian Tribal Cmty., 951 F.3d 1142, 1158 (9th Cir. 2020) (enforcement of an easement railroad voluntarily entered into did not constitute "regulation" of rail operations subject to ICCTA preemption); Ass'n of Am. R.Rs., 622 F.3d at 1098 (finding state environmental law at issue preempted and stating that ICCTA "generally does not preempt" federal environmental laws implemented by states but requires that when two federal statutes are involved courts (and the Board) must attempt to harmonize them); United States v. St. Mary's Ry. W., 989 F. Supp. 2d 1357, 1362 (S.D. Ga. 2013) (court held that regulation under CWA requiring railroad to obtain a permit for discharges into wetlands made during construction of a spur track did not constitute regulation of rail transportation and therefore did not conflict with ICCTA's goal of preventing the balkanization of regulation of rail transportation); Humboldt

The Board does not suggest that every requirement under the CWA that may differ from state to state would be preempted as applied to railroads.[20] However, rail cars in transit are inherently instrumentalities of interstate commerce; as such, subjecting them to differing regulatory requirements as they pass from one state to the next is likely to be incompatible with the free flow of interstate commerce that Congress envisioned when enacting § 10501(b). In contrast, other applications of the CWA, such as non-discriminatory application to discharges from certain types of stationary facilities owned or operated by railroads, including application to stormwater discharges from fueling facilities, maintenance facilities, or rail construction sites,[21] are generally not preempted because, although they may differ from state to state, they do not typically conflict with § 10501(b)'s goal of preventing differing regulations from interfering with the free flow of interstate commerce.[22]

A nationwide uniform general NPDES permit for incidental discharges from rail cars in transit might not be preempted. As explained above, application of the NPDES permitting program, which allows for disparate and varying state-specific regulatory requirements, is likely to result in a patchwork of regulations irreconcilable with § 10501's goal of ensuring the free flow of interstate commerce. A nationwide uniform general permit for

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Baykeeper v. Union Pac. R.R., No. 06-cv-02560, slip op. at 4 (N.D. Cal. May 27, 2010) (court held that the cost of litigating a CWA suit regarding discharges from maintenance and fueling facilities does not constitute an unreasonable burden warranting preemption).

[20] See Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1131 (10th Cir. 2007) (explaining that that "Congress did not intend to pre-empt all state and federal law that might touch on a railroad's property or actions" but rather intended to limit preemption to regulation that conflicts with the federal scheme of rail regulation); H.R. Conf. Rep. No. 104-422 at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 850, 853 (1995) (explaining that the exclusivity of remedies under § 10501(b) "is limited to remedies with respect to rail regulation—not State and Federal law generally.")

[21] AAR notes that NPDES permits are frequently issued for discharges from certain types of stationary rail facilities, such as stormwater discharges associated with fueling and maintenance. (AAR Pet. at 17-18.) As AAR notes, the regulation of discharges from stationary facilities is not at issue in its petition. (Id. at 17.)

[22] The fact that the Board's environmental regulations at 49 C.F.R. § 1105.7 require railroads to provide certain information regarding compliance with permitting requirements under the CWA during the environmental review process for proposed rail constructions and abandonments is a recognition that the application of the CWA to these types of licensing proceedings is generally not preempted. But it does not indicate, as the Environmental Organizations contend, that the Board, when drafting the regulations, believed that the CWA's NPDES permitting program in its current form would apply to incidental discharges from rail cars in transit, particularly given that the Board's environmental regulations predate the Sierra Club court decision suggesting for the first time that the CWA program could be applied to such discharges.

incidental discharges from rail cars in transit, however—if adhered to by each of the states—would avoid this patchwork problem.[23]

BNSF and AAR note that even if EPA were to issue a nationwide uniform general permit for incidental discharges from rail cars in transit, EPA could not prevent states from imposing varying permit requirements through the certification process pursuant to 33 U.S.C. § 1341, just as they did with respect to EPA's general permit for marine vessels. (AAR Reply 8; BNSF Reply 12.) The Board agrees that if states were to impose varying state-specific requirements on a rail car general permit issued by EPA via the certification process, any such requirements would likely also create a patchwork of differing regulations in irreconcilable conflict with the core purpose of § 10501(b). Therefore, any such additional state requirements would likely be preempted, even though a nationwide uniform general NPDES permit might not be. BNSF argues that the Board must find that a nationwide general permit issued by EPA would also be preempted because preempting the states' role in the NPDES permitting system while allowing EPA to potentially issue a general permit would be inconsistent with the structure of the CWA, which is designed to ensure a role for the states in the permitting process. (BNSF Reply 12.) That argument goes to how the CWA can and should be administered and is better left for EPA to decide in the first instance. To the extent that EPA could issue a nationwide general permit for incidental discharges from rail cars in transit that includes uniform requirements for the states, such a nationwide general permit would not create a patchwork of differing regulations and could therefore potentially be harmonized with § 10501(b).

BNSF suggests that even if states could not alter the requirements of a nationwide uniform permit, such a permit necessarily would be preempted because it would constitute regulation of rail transportation by a federal agency other than the Board and would therefore conflict with the Board's exclusive jurisdiction to regulate rail transportation under § 10501(b). (BNSF Reply 12.) However, section 10501(b) has never been applied to prohibit all regulation of rail transportation by other federal agencies. Rather, as previously noted, where there is an apparent conflict between § 10501(b)'s grant of exclusive jurisdiction and another federal statute, the Board must attempt to harmonize the two statutes to the extent possible. For example, the Board and courts have indicated there generally is not an irreconcilable conflict between the Federal Railroad Safety Act (FRSA) and § 10501(b) because Congress intended the Federal Railroad Administration (FRA) under FRSA to exercise primary authority over matters of rail safety and intended the Board under ICCTA to exercise primary authority over other areas of rail transportation. See Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001); CSX Transp. May 2005, FD 34662, slip op. at 6-7.

Here, harmonization might be possible with respect to a nationwide uniform general permit for incidental discharges from rail cars in transit. A nationwide permit, with only uniform

[23] The Board does not address here whether EPA has the authority to issue a nationwide uniform general permit. AAR claims that it is not clear that EPA has the authority to issue a general permit for incidental discharges from rail cars because EPA did not reserve its authority under the CWA to regulate rail cars when it delegated authority to the 47 states now authorized to administer the NPDES permitting program. (AAR Comments 10 n.4.) That question is not before the Board in this proceeding and, in any event, is not for the Board to decide.

requirements, would not create a patchwork of regulation of rail transportation that interferes with the free flow of interstate commerce. Because a uniform nationwide permit would not result in such a patchwork applied to rail cars in transit, a preemption determination would require an analysis of the specific permit requirements to determine if they are otherwise irreconcilable with § 10501(b)'s purpose of ensuring the free flow of interstate commerce. Because no national permit has been issued, the Board will not opine on the issue further.[24]

Preemption of the CWA's NPDES permitting program and discharge prohibition does not abrogate treaty-reserved rights. According to the Tribes of Warm Springs and the Yakama Nation, the CWA protects their treaty-reserved rights to harvest fish, and the Board has a duty to ensure that these treaty-reserved rights are given full effect. (Tribes of Warm Springs Comments 3; Yakama Nation Comments 2-4.) They argue that the Board should decline to issue an order finding that the CWA's NPDES permitting program and discharge prohibition are preempted to ensure that their treaty-reserved rights are not violated. (Tribes of Warm Springs Comments 3-4; Yakama Nation Comments 4.) The Board is not issuing an order finding preemption but rather is providing guidance. Moreover, any treaty-reserved rights are based not in the CWA, but in the treaties themselves. To the extent that any treaty prohibits discharges from rail cars, the Tribes can seek to enforce the terms of the treaty independent of the CWA.

For the reasons discussed above, the petition for declaratory order will be denied.

It is ordered:

1. All late filings are accepted into the record.

2. The petition for declaratory order is denied, as explained above.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

[24] AAR and BNSF point to the Board's Coal Dust decisions, which addressed ways for railroads to limit the loss of coal in transit and the reasonableness of certain BNSF tariff requirements, and raise concerns that any NPDES permit for incidental discharges from rail cars in transit would conflict with the outcome of those cases. (AAR Pet. 21-23; BNSF Comments 17-18.) However, the Coal Dust decisions involved the question of what requirements were reasonable to impose on shippers in particular coal tariffs based on the record before the Board in those cases. The inquiry regarding any nationwide uniform general permit for incidental discharges from rail cars in transit would be a different inquiry into whether the terms in any such permit would irreconcilably conflict with the free flow of commerce by railroads, not shippers.